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In the Supreme Court of the United States

OCTOBER TERM, 1975

CARMEN BASTONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

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NO.

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Carmen Bastone, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals, *United States* v. *Bastone*, reported at 526 F.2d 971, is reprinted as Appendix A, *infra*.

Jurisdiction

The opinion of the Court of Appeals was entered on December 8, 1975. Petitioner's petition for rehearing and suggestion for rehearing in banc, timely filed, was denied

on February 12, 1976. (Appendix B, *infra.*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Was there a variance between the indictment, charging a single conspiracy, and the proof, which at best showed a number of separate, unrelated conspiracies, at least one of which had completely terminated prior to petitioner's alleged involvement?

2. If there was such a variance, was it not prejudicial to petitioner in that the jury was permitted to consider against him evidence pertaining to separate conspiracies to which he was not a party, including acts and declarations of members thereof, and further, because the indictment did not adequately advise petitioner of the offense which he was called upon to defend?

3. May petitioner's conviction for conspiracy to *transport* stolen trailers in interstate commerce be upheld where the Court of Appeals' rationale for finding a single conspiracy—*i.e.*, that "the single objective of the conspiracy" was "the *sale* of stolen trailers," without regard for the federal jurisdictional nexus, and in an evidentiary framework which included purely local transactions?

4. Since there was, at the very least, a possibility of multiple conspiracies, was petitioner deprived of a fair trial where the trial court not only refused to instruct the jury per defense requests on this issue, but gave instead a *sua sponte* instruction intended to cure the prejudicial effects of possible variance but clearly insufficient so to do?

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5. Does not the Seventh Circuit's ruling on the multiple conspiracies issue conflict with principles announced by this Court in *Kotteakos* v. *United States,* 328 U.S. 750, with other Seventh Circuit decisions, and with decisions from other Circuits, particularly with respect to the necessity of giving thorough, careful cautionary instructions concerning the possible existence of multiple conspiracies whenever—as here—the evidence reasonably may so be construed?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be held to answer for a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor be deprived of life, liberty or property, without due process of law; . . ."

The statute for violation of which petitioner was convicted is 18 U.S.C. 371 (conspiracy), and the statute, violation of which was alleged to be the object of said conspiracy, is 18 U.S.C. 2314 (interstate transportation of stolen property). (This petition raises no issues regarding construction or application of these statutes.)

STATEMENT OF THE CASE

Petitioner, Carmen Bastone, was charged in a one-count indictment (74 CR 383, superseding 74 CR 223) with having conspired, with nineteen named co-defendants[1] and

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[1] Petitioner and seven others actually went to trial. Tried with petitioner by a jury were Salvatore Bastone, William Pullia, Vincent McMahon, Warren Eugene Jackson, James Colvett, Arthur Veal, and T. G. Grey. Grey was permitted to change his plea during trial, and the cases of the remaining defendants were submitted to the jury. Salvatore Bastone was acquitted; the remaining defendants on trial were found guilty. Only petitioner and Arthur Veal appealed; Veal's conviction was affirmed in the same opinion as was (Footnote continued)

four named but unindicted co-conspirators, and with others unknown to the grand jury, to transport stolen semi-trailers in interstate commerce. (R. 1)[2]

All motions, objections and requests for instructions by any of the defendants on trial were considered as adopted by all unless specifically disavowed. (Tr. 35-A, 80, 2228)

Petitioner's motion for directed verdict at the close of the government's case (R. 158) was denied (R. 162), and his motion for judgment of acquittal at the close of all the evidence (R. 167), taken under advisement, was denied (R. 210), together with his post-trial motions in arrest of judgment (R. 185) and for a new trial (R. 186), after the jury's verdict of guilty. (R. 176-77) The court sentenced petitioner to 5 years imprisonment. (R. 219)

(Footnote continued)

petitioner's. (See App. A.)

Defendant Lonero's case was severed prior to trial (due to his illness), (Tr. 3-A), and the remaining defendants all pleaded guilty prior to trial. Of these, Athas, Murray, Garner, Walley, and Schoenneman all testified for the prosecution, and Quagliato was called as a witness on petitioner's behalf. The remaining five defendants who pleaded guilty prior to trial (Falcione, Boenzi, Paradise, Marino and DeRosa) did not testify at trial.

[2] "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings, both on file in the Court of Appeals in No. 75-1417.

The indictment charged that from June 1, 1968 to December 31, 1972, petitioner and the others conspired, "with unlawful and fraudulent intent to transport and cause to be transported in interstate commerce from Chicago, Illinois to locations outside the State of Illinois, stolen semi-trailers of a total value in excess of $5,000.00, knowing the same to have been stolen, unlawfully converted and taken by fraud; in violation of Title 18, United States Code, Section 2314." (R. 1)

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Statement of Facts

As the prosecution's case developed, the evidence tended to show a number of separate, unrelated conspiracies, the only connecting link being Ronald Schoenneman, the prosecution's chief witness.

Schoenneman testified that in 1970 he was introduced to petitioner, to whom he explained the stolen trailer business. According to Schoenneman, petitioner subsequently arranged for various thieves to steal trailers for hire, with petitioner to get a percentage of the profits, after expenditures to the thieves, for titles, and for having stolen trailers cleaned and altered to reflect serial numbers matching the titles. Later, per Schoenneman, petitioner assisted Schoenneman in raising money to finance the operation. (Tr. 5, 9-11, 24, 45-49, 52-62)

Schoenneman also testified concerning a stolen trailer operation involving himself, unindicted co-conspirator Svehla, and co-defendant Murray, which entirely separate conspiracy was not alleged to have involved *any* of the defendants then on trial. (Tr. 35-40, 49, 71-74) Petitioner's motion for mistrial or to strike this evidence as being fatally variant from the allegations of the indictment (R. 144) was denied. (R. 145) There was also evidence of a separate conspiracy amongst Schoenneman and Murray involving the use of the O'Rourke Cartage yard at Calumet Harbor. (Tr. 168-71, 1123-33)

While the indictment charged a single conspiracy beginning on June 1, 1968 and continuing to December 31, 1972, Schoenneman's testimony demonstrates a separate conspiracy which began in 1968-69 involving himself, Gar-

ner[3] and Murray,[4] (Tr. 677), which ended completely in 1969-70, due to "heat" from the authorities; Schoenneman therefore went out of the "trailer business" for some 6 months to a year, per his own testimony. (Tr. 559, 678)

Aside from the testimony of Schoenneman, an accomplice witness who had received vast benefits from the government in exchange for his testimony,[5] petitioner was implicated only by the testimony of co-defendant Athas, (Tr. 1595-1600), and indirectly by testimony of a Mr. Gorbien. (Tr. 1559-72).[6] None of the other prosecution witnesses who testified after pleading guilty implicated petitioner in any way.

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[3] Garner had pleaded guilty prior to trial and testified for the government.

[4] Murray had pleaded guilty prior to trial and testified for the government.

[5] Schonneman in fact had received approximately $33,000.00 from the government (as of the date of petitioner's motion for new trial); the government had recommended probation in exchange for his "cooperation"; because of his "new identity" and secret whereabouts, in addition to securing the supposed governmental "protection" from those against whom he testified, he managed to avoid paying legitimate debts amounting to over $350,000.00; and, although he had filed no federal income tax returns during the indictment period, he apparently was not going to be prosecuted in connection therewith. Nor was he being prosecuted for numerous other offenses revealed in his testimony. (Tr. 4, 477-514, 528, 552-75; see R. 187, p. 4.)

[6] While prosecution witness Ponzevic testified that petitioner "may have been" the man who accompanied Schoenneman (Tr. 1162) in a meeting with the witness wherein the proposed purchase of used trailers (later consummated) was discussed, this purported identification was tentative at best.

Petitioner presented evidence: demonstrating Schoenneman's inaccessibility to service of process for collection of debts owed by him by virtue of his being in the "protective custody" of the government (Tr. 1814); contradicting Schoenneman on a crucial issue as to petitioner's allegedly having been present and having participated in an alleged conversation with trailer thieves (Tr. 1819-38); and corroborating his defense theory that his connection with Schoenneman in the purchase of used trailers was in furtherance of a legitimate business enterprise. (Tr. 1839-42).[7]

Refused requested defense instructions pertinent to the "multiple conspiracies" issue are reproduced in Appendix C, *infra*.

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[7] Although petitioner does not attack the legal sufficiency of the evidence, the posture of the government's case against him certainly was far from strong, which must be taken into consideration in determining the prejudicial effect upon his trial of the serious error urged herein.

REASONS FOR GRANTING THE WRIT

There was a prejudicial variance between the indictment, charging a single conspiracy, and the proof, which at best showed a number of separate, unrelated conspiracies, at least one of which had completely terminated prior to petitioner's alleged involvement. This resulted in prejudice to petitioner in that the jury was permitted to consider against him evidence pertaining to conspiracies to which he was not a party, including acts and declarations of members thereof, and further, because the indictment did not adequately advise him of the offense which he was called upon to defend.

At the very least, there was a possibility of multiple conspiracies; hence, the court's refusal to instruct the jury per defense requests on this issue—together with its giving a sua sponte instruction intended to cure the prejudicial effects of possible variance but clearly insufficient so to do—requires reversal.

The Seventh Circuit's express reason for finding a single conspiracy is its conclusion that "the single objective of the conspiracy" was "the **sale** *of stolen trailers,"* without regard for the federal jurisdictional nexus—as charged in the indictment—that defendant conspired with others to* **transport** *stolen trailers* **in interstate commerce.**

The Seventh Circuit's ruling on the multiple conspiracies issue conflicts with principles announced by this Court in Kotteakos v. *United States, 328 U.S. 750, with other Seventh Circuit Decisions, and with decisions from other Circuits, particularly with respect to the necessity of giving*

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*App. A, p. App. 11, text accompanying fn. 5.

thorough, careful, cautionary instructions concerning the possible existence of multiple conspiracies whenever—as here—the evidence reasonably may so be construed.

• • •

As the prosecution's case developed, the evidence tended to show a number of separate, unrelated conspiracies, the only connecting link being Ronald Schoenneman, the prosecution's chief witness. (See pp. 5-6, *supra.*)

It is obvious that these various transactions do not evidence a single, unified conspiracy, as alleged in the indictment. The only arguable connection amongst all the activities is Schoenneman.

This Court has declared that where multiple conspiracies are shown while a single one was charged, a conviction cannot stand if the jury may have considered against a defendant, acts and declarations of others in furtherance of one or more of the separate conspiracies to which he was not a party. *Kotteakos* v. *United States,* 328 U.S. 750 (1946). That, we submit, was exactly the case here.

The evidence as outlined above (pp. 5-6, *supra*), clearly showed multiple conspiracies, if any, rather than a single one as alleged in the indictment, under the criteria set forth in *Kotteakos,* its progeny, and even its predecessors.

The point was properly raised by appropriate motions below. (R. 144, 158, 187; Tr. 49, 71-74)

The evidence does not support a finding of one conspiracy. Petitioner's conviction therefore cannot stand. *United States* v. *Johnson,* 515 F.2d 730 (7 Cir. 1975); *Daily* v. *United States,* 282 F.2d 818, 821-22 (9 Cir. 1960); *Canella* v. *United States,* 157 F.2d 470, 477-78 (9 Cir. 1946); *United States* v. *Varelli,* 407 F.2d 735, 741-44 (7

Cir. 1969); *Rocha* v. *United States,* 288 F.2d 545, 551-53 (9 Cir. 1961); *Fernandez* v. *United States,* 329 F.2d 899, 904-05 (9 Cir. 1964); *Brooks* v. *United States,* 164 F.2d 142 (5 Cir. 1947); *United States* v. *Russano,* 257 F.2d 712, 715-16 (2 Cir. 1958); *United States* v. *Butler,* 494 F.2d 1246, 1254-57 (10 Cir. 1974); *Tinsley* v. *United States,* 43 F.2d 890, 892-93 (8 Cir. 1930); see *United States* v. *McDaniels,* 57 F.R.D. 171, 176 (E.D. La. 1972).

> "[W]here one general conspiracy is charged, proof of several conspiracies constitutes a variance, and . . . the harmless error rule . . . will not save a reversal where it is not made clear that no prejudice has resulted from the error." *Brooks* v. *United States,* 164 F.2d 142, 142 (5 Cir. 1947) (reversing and remanding).

Even if some of the defendants may properly be said to have participated in a single conspiracy, assuming such conspiracy existed, there is no evidence that petitioner was a party to any such conspiracy; at best, the evidence would tend to connect him with a sub-conspiracy involving only himself and Schoenneman, together with a few specified trailer thieves, which does *not* suffice to prove him part of any supposed over-all scheme.[8]

Arguably, petitioner was one of several sources from whom stolen trailers were obtained for fraudulent resale.

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[8] "[T]here is proof as to most, if not all, of the appellants tending to show complicity in one or more illegal enterprises or ventures having to do with distilled spirits. It is equally clear, however, that while the proof tends to connect some of the defendants in a common conspiracy, it completely fails to connect others of the defendants to that conspiracy. On the contrary, it tends to show the existence of, and to connect some of the defendants with, entirely separate and distinct conspiracies. . . . [I]t was reversible error to send them all to the jury under an indictment in one count charging one general conspiracy." *Brooks* v. *United States, supra,* at 143.

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Nothing demonstrates that he received any financial gain other than that flowing from the sale of trailers allegedly obtained through him. This does *not* suffice to hold petitioner criminally liable for the entire venture. *United States* v. *Braico*, 422 F.2d 543, 544 (7 Cir. 1970); *United States* v. *Ford*, 324 F.2d 950 (7 Cir. 1963).

Petitioner cannot stand convicted because the evidence does not permit the conclusion that he was aware of the scope of the supposed over-all enterprise and knowingly participated therein. *United States* v. *Falcone*, 311 U.S. 205 (1940); *United States* v. *Peoni*, 100 F.2d 401 (2 Cir. 1938); *Dennis* v. *United States*, 302 F.2d 5, 12 (10 Cir. 1962).[9]

Moreover, the variance permits the possibility that petitioner may have been convicted of an offense or offenses other than that concerning which the grand jury which returned the indictment heard evidence. This, too, is wholly impermissible. *Stirone* v. *United States*, 361 U.S. 212 (1960).

That the evidence in the case at bar showed, if anything, several conspiracies rather than a single conspiracy, is clear. *Compare* the facts in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and in the cases cited at pp. 9-10, *supra*, where multiple conspiracies were found to have been demonstrated, *with* the facts in *Blumenthal* v. *United States*, 332 U.S. 539 (1947), *Berenbeim* v. *United States*,

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[9] In *Dennis*, the court reversed as to all defendants, remanding some for new trial, stating:

> "Without knowledge, the intent to participate in an established conspiracy cannot exist, and '* * * to establish the intent, the evidence of knowledge must be clear, not equivocal.' *Ingram* v. *United States*, 360 U.S. 672, 680, 79 S.Ct. 1314, 3 L.Ed.2d 1503." 302 F.2d at 12.

164 F.2d 679 (10 Cir. 1947),[10] and *United States* v. *Calabro*, 449 F.2d 885, 892-94 (2 Cir. 1971),[11] where single conspiracies were found to have been proven.

Especially pertinent is *United States* v. *Russano*, 257 F.2d 712 (2 Cir. 1958), where the evidence showed that a narcotics conspiracy which began in 1952 ended late that year due to arrests, that none of its participants engaged in the narcotics business during 1953-54, and that some of the participants were "back in business" in 1955-56. Upon such evidence, the court reversed convictions for a single conspiracy alleged to have existed from 1952 to 1956. This closely parallels the facts herein with regard to Schoenneman's having gone "out of the trailer business" during the indictment period. (Tr. 559, 677-78)

Nor would the fact that petitioner may arguably be said to have been connected with one or more of the several conspiracies save the government's case; for in those cases affirming despite a showing of multiple conspiracies wherein a single one had been charged, the courts explicitly held that in each such case, the defendants clearly

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[10] In *Berenbeim*, while the court affirmed because on the evidence it found but a single conspiracy, the court noted:

> "It is well settled that where the indictment charges a single conspiracy and the proof establishes two or more different and disconnected conspiracies, the variance is fatal and a conviction cannot be sustained." 164 F.2d at 683.

[11] In *Calabro*, in direct contrast to the factual posture of the case at bar, the court concluded that:

> "Appellants' continuous involvement with each other provided the common thread upon which the jury properly could find the single conspiracy charged." 449 F.2d at 893.

No such evidence exists in the case at bar.

were demonstrated to have been parties to *each* of the separate conspiracies shown.[12]

Moreover, it has been held that even one who was a party to *all* of a number of separate conspiracies could not stand convicted therefor upon an indictment charging but a single conspiracy.[13]

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[12] See, *e.g.*, *United States* v. *Walker*, 453 F.2d 1205 (5 Cir. 1972) (one conspiracy charged, three shown, defendant connected with all three separate conspiracies); *cf. United States* v. *Benjamin*, 328 F.2d 854, 864 (2 Cir. 1964) (court concluded there was only one scheme despite contention that two were shown; but even if there were two, such argument "could not avail Benjamin in any event since the evidence clearly implicated him in both aspects of the scheme.").

[13] After reversing the convictions of two appellants who were shown to have been involved, at most, in conspiracies separate from the single one charged and not knowledgeable of any single conspiracy, the court proceeded also to reverse the conspiracy conviction of the most heavily involved of the defendants, characterized as the "mastermind," because of the fatal variance:

> "As for Fernandez, there is evidence connecting him with all of the substantive counts. And to the extent that there was a conspiracy, or were conspiracies, between two or more persons in connection with these and similar transactions, he, as the so-called 'mastermind,' was a direct participant therein, knew of any such conspiracy or conspiracies, and was aware of their nature and purpose.
>
> "But there is nevertheless *wholly lacking any evidence showing that there was a single over-all conspiracy to engage in these separate and distinct transactions which occurred at different times and places and involved varying persons and methods of operation. At most, the evidence establishes several diverse conspiracies radiating from Fernandez in all of which he participated*, and in one or two of which Dalgliesh and Pratt participated. *This being true, the conviction on the conspiracy count cannot stand even as to Fernandez* and, on this additional ground, it cannot stand as to Dalgliesh and Pratt." *Fernandez* v. *United States*, 329 F.2d 899, 905 (9 Cir. 1964) (footnote omitted; emphasis added).

As to the extent of petitioner's non-participation in an alleged unified conspiracy herein, see *United States* v. *Manarite,* 448 F.2d 583, 589-90 (2 Cir. 1971), which describes a conspiracy similar to that alleged in the case at bar, and, by way of contrast, demonstrates what is prerequisite to find that one is party to a single conspiracy; the factual elements held necessary, and found to exist in *Manarite,* are utterly lacking in the case at bar.

In several cases wherein defendants claimed on appeal that one, rather than several, conspiracies had been shown where it was to defendant's advantage that only one had been shown, the courts have found, on facts similar to those in the case at bar, that multiple conspiracies were properly found.[14]

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[14] For example, in *United States* v. *Cole,* 457 F.2d 1141 (9 Cir. 1972), defendant claimed double jeopardy, in that he was convicted under two indictments for conspiracy—one involving the manufacture of methamphetamine, and one involving its distribution. Noting that the persons and activities involved in the manufacturing operation were different from those involved in the distribution, *id.* at 1144, with the sole exception of defendant, who was common to both, the court found two conspiracies had been shown and therefore affirmed, stating:

> "The fact that there is one individual common to two separate criminal enterprises does not constitute them a single operation." *Id.* at 1145.

Similarly, in *United States* v. *Aviles,* 274 F.2d 179, 193-94 (2 Cir. 1960), two defendants (the brothers Lessa) maintained that since they had already been convicted in another case for participation in the same conspiracy, the instant conviction constituted double jeopardy. The court disagreed, holding:

> "Thus the Lessas, as dealers, simply purchased their narcotics supplies from two different and separate groups. The mere fact that several retailers purchase from separate suppliers at different times does not transform two separate conspiracies into one." *Id.* at 194.

Based upon all the foregoing, petitioner's conviction should be reversed for fatal variance between the charge and the proof.[15]

The Seventh Circuit's express reason for finding but a single conspiracy on the facts—aside from that set forth in footnote 15, below—was:

> "[T]he proof here plainly demonstrated one overall agreement among the various parties to perform dif-

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[15] In the face of petitioner's argument, the Seventh Court notes that some of the evidence of other conspiracies was adduced on defense cross-examination, rather than on direct examination by the prosecution, using this to justify a finding of one conspiracy: "We do not believe it would be fair to allow the defense to manufacture a variance through use of cross-examination of the government's chief witness." (App. A, p. App. 12, fn. 7) And in justifying refusal of requested defense instructions concerning multiple conspiracies, the court holds them "not appropriate where the defense attempts to create a variance through cross-examination by bringing in new conspiracies." (App. A, p. App. 12)

But the court wholly has overlooked that *the very first disclosure of an unrelated conspiracy came during the very beginning of the prosecution's case.* (Tr. 35-40, 49, 71-74) Defense motions for mistrial or to strike this evidence were denied. (R. 144-45) Additional evidence of an unrelated conspiracy was also adduced by the prosecution. (Tr. 168-71)

Clearly, once the prosecution brought out evidence demonstrating —at the very least—the possibility of multiple conspiracies as opposed to the single one as charged in the indictment, petitioner had a right to cross-examine the government's chief witness concerning those additional conspiracies, and indeed, defense counsel had a duty to his client to pursue this; if yet additional separate conspiracies thereby were disclosed, that they were disclosed on cross-examination rather than by the government must not be held to defeat petitioner's otherwise valid claim. This was *not* a situation of the defense, in bad faith, attempting to structure a case of multiple conspiracies where the government's proof showed only one; *it was during the government's case that possible multiple conspiracies first were disclosed.*

ferent functions in order to carry out the single objective of the conspiracy—*the sale of stolen trailers.*" (App. A, p. App. 11) (Emphasis added.)

This *completely* overlooks the fact that the indictment charged—as it must, to allege a conspiracy to violate federal law—that defendants conspired *to transport stolen trailers in interstate commerce.*[16]

The court acknowledges that "The evidence also showed a few collateral transactions that were not totally directed toward the main scheme or conspiracy." (App. A, p. App. 11) But the court goes on to hold that the trial judge's instructions were adequate. (App. A, p. App. 11)

They were not.

And therein lies the prejudice.

The instruction cited by the panel as "adequate", (see App. A, p. App. 11, fn. 6), *clearly* is inadequate to protect petitioner from the dangers of having the jury consider against him acts and declarations made by others in furtherance of something other than any conspiracy with which they might have found him to have been connected; for the instruction does not, nor do any other of the instructions given, allow for the consequences of the possibility that more than one conspiracy was shown.

At the very least, the court should have instructed the jury as to the necessity of finding a single conspiracy, as opposed to several, as prerequisite to conviction, rather than leaving them no option but to find one conspiracy, if they found any at all; and/or that if they found more than one, they could attribute as evidence against petitioner *only* such acts and declarations of others in furtherance of the same conspiracy or conspiracies of which they may have found petitioner to have been a member. *United*

[16] Such approach is especially erroneous where—as here—there was substantial evidence of purely local transactions. (*E.g.*, Tr. 105, 195-201, 268, 278, 294, 462-69.)

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States v. *Johnson*, 515 F.2d 730, 735-36 (7 Cir. 1975). Without such limiting instructions, petitioner was irremediably prejudiced by the variance between the indictment and the proof. Indeed, where the evidence is susceptible of an interpretation that more than one conspiracy may have been shown while only one was charged, failure to give such instructions, *even in the absence of a specific request therefor*, has been held plain error requiring reversal.[17]

In *Johnson, supra*, the court reversed because of the trial court's failure to give adequate instructions to prevent prejudice due to proof of multiple conspiracies; instructions which failed unequivocally to keep the jury from considering evidence pertaining to a conspiracy of which defendant was not a member required reversal.

The trial court refused various defense instructions aimed at the multiple conspiracy problem, (Def. C. Bastone's Inst. 18, Def. S. Bastone's Inst. Q, Def. McMahon's Insts. 42, 43 & 44) (set forth *infra*, App. C, p. App. 33-34), and instead gave its own instruction on the subject. (Tr.

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[17] *United States* v. *Borelli*, 336 F.2d 376, 382-87 (2 Cir. 1964); *United States* v. *Kelly*, 349 F.2d 720, 756-58 (2 Cir. 1965).

See *United States* v. *Griffin*, 464 F.2d 1352, 1357-58 (9 Cir. 1972) (affirming despite showing of multiple conspiracies where jury was given appropriate instructions covering such possibility and attenuating possible prejudice); *United States* v. *Varelli*, 407 F.2d 735, 746 (7 Cir. 1969) (reversing for showing of multiple conspiracies, stating that court should give appropriate instructions "when the possibility of a variance appears"); *United States* v. *Calabro*, 449 F.2d 885, 892-94 (2 Cir. 1971) (affirming because only one conspiracy shown despite defense contention that two were demonstrated, *id.* at 893, and noting that "[I]t is better practice to instruct the jury that they must acquit if they find multiple conspiracies when only one conspiracy is charged. . . ." *Id.* at 894).

2370; see Tr. 2290-94) [18] Conceding *arguendo* that the requested instructions may have asked for too much, [19] nonetheless the court's instruction was wholly insufficient because it did *not* advise the jury that acts and declarations of persons in furtherance of a separate conspiracy or conspiracies to which petitioner had not been connected could not be considered against him.

The general cautionary instruction relied on by the court, (App. A, p. App. 11, fn. 6), was insufficient as well,[19] because

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[18] The Court's only instruction touching upon the multiple conspiracy problem is as follows:

> "The indictment in this case charges a single criminal conspiracy participated in by the defendants and others within a specific period of time and for a specific purpose. To prove a defendant guilty, the Government must prove beyond a reasonable doubt that such defendant knowingly and willfully participated in this particular conspiracy at some time during the period alleged.
>
> However, the Government need not prove that all of the defendants participated in the alleged conspiracy or that they all participated at the same time. Evidence of some other conspiracy or some other illegal act does not constitute evidence of the specific conspiracy alleged in the indictment and is irrelevant to it." (Tr. 2370)

[19] *But see Fernandez* v. *United States*, 329 F.2d 899, 904-05 (9 Cir. 1964), discussed at p. 13, fn. 13, *supra*. According to *Fernandez*, the variance itself precludes conviction, as the requested instructions would have advised. *Accord*, *United States* v. *Calabro*, 449 F.2d 885, 894 (2 Cir. 1971).

[20] Instructions can be erroneous, requiring reversal, if under the facts of a particular case they are inadequate, inapplicable or confusing, even though they may correctly state abstract principles of law. See, *e.g.*, *United States* v. *Collier*, 313 F.2d 157, 159 (7 Cir. 1963); *Morris* v. *United States*, 326 F.2d 192, 194-95 (9 Cir. 1963); *United States* v. *Torrence*, 480 F.2d 564, 565 (5 Cir. 1973). Moreover, failure to relate the facts of the case to the law as stated in the instructions can constitute plain error. See *Choy* v. *Bouchelle*, 436 F.2d 319, 325 (3 Cir. 1970), a civil case cited with approval in *United States* v. *Rosenfield*, 469 F.2d 598, 601 (3 Cir. 1972).

it did not include any explicit reference to possible multiple conspiracies.

Where the evidence discloses multiple conspiracies, at the very least the court must give careful instructions limiting the use against an individual defendant of acts and statements of alleged co-conspirators in furtherance of a conspiracy to which defendant was not shown to have been a party. No such instructions were given here. Thus, petitioner's conviction may well be based, at least in part, upon the jury's improperly having considered against him evidence pertaining only to a conspiracy or conspiracies in which he was not involved. Since such inadmissible evidence may have contributed to petitioner's conviction, the conspiracy conviction should be reversed.

Even if multiple conspiracies have not been demonstrated as a matter of law,[21] since the evidence admits of the *possibility* of multiple conspiracies, *the issue as to multiple or single conspiracies should have been submitted to the jury under appropriate instructions.*

This mandatory procedure not having been followed, reversal is required.

In the Seventh Circuit's own language, from *United States* v. *Varelli*, 407 F.2d 735, 746 (7 Cir. 1969):

> "Since the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several. . . . [citations omitted] Therefore, . . . when the possibility of a variance appears, [the district judge] should instruct the jury on multiple conspiracies as well."

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[21] Compare *United States* v. *Johnson*, 515 F.2d 730, 733, 736 (7 Cir. 1975), where the court held as a matter of law that separate conspiracies, not the single conspiracy alleged, had been demonstrated by the evidence.

The prejudice herein lies in the realistic probability that the jury considered against petitioner evidence of acts and declarations of others in furtherance of a conspiracy or conspiracies with which petitioner had not been connected; for the jury was never advised that, if it found more than one conspiracy, such evidence was *not* to be considered against petitioner. This same danger, too, exists with regard to evidence of overt acts.

In *Kotteakos* v. *United States,* 328 U.S. 750, 774 (1946), this Court stated:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place."

Further discussing the specific kinds of prejudice suffered by a defendant connected with less than all of multiple conspiracies under an indictment charging but a single one, the Court held:

> "On these instructions[22] it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some." *Id.* at 771. (Footnote added.)

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[22] The instructions the jury had been given in *Kotteakos,* set forth in *id.* at 767-70, are substantially similar to the jury charge in the case at bar, particularly in their common failure to limit the jury's consideration of evidence pertaining to possible separate conspiracies. This, too, was the vice requiring reversal of the conspiracy conviction in *Johnson, supra.*

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Evidence of possible separate conspiracies in the case at bar [23] was such as to require the giving of appropriate jury instructions pursuant to the foregoing authorities.[24]

While there was some evidence adduced from Schoenneman which may be susceptible of an interpretation that petitioner was involved in all illegal operations after mid-1970, the jury was not required to accept such interpretation or even to believe Schoenneman; and the question was never resolved under "appropriate judicial guidance," *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946), for the jury was given no alternatives, nor were they instructed regarding the consideration of evidence bearing on less than all of the possible multiple conspiracies.

Commenting on the need for careful limiting instructions—such as were omitted from the case at bar—this Court, in *Kotteakos, supra,* held:

> "The greater looseness generally allowed [in conspiracy prosecutions] for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. . . . [E]xtraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each de-

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[23] *I.e.,* the admitted hiatus and cessation of illegal activities by Schoenneman in 1969-70, (Tr. 559, 678); evidence of separate conspiracies involving Schoenneman, Garner and Murray in 1968-69 (Tr. 67); involving Schoenneman, Svehla and Murray (Tr. 35-40, 49, 71-74); and involving Schoenneman and Murray in a separate operation utilizing the O'Rourke Cartage yard at Calumet Harbor (Tr. 168-71, 1123-33).

[24] See also cases cited at p. 17, *supra,* and at p. 17, fn. 17, *supra.*

> fendant individually, as far as pos ible, from loss of identity in the mass. *Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct.*" *Id.* at 776-77. **(Emphasis added.)**

Indeed, it is this very "greater looseness generally allowed" which results in prejudice to a defendant where, as here, the government chooses to prosecute as a single conspiracy a case wherein the evidence demonstrates the possibility of separate conspiracies. Once trial has been had upon a single conspiracy theory—where, as here, the evidence is susceptible of demonstrating multiple conspiracies—the government has accomplished its purpose: to strengthen the possibility of conviction by exposing the jury to evidence under the relaxed principles applicable to conspiracy trials, capitalizing on the possibility that because of the possibility of multiple conspiracies, evidence not properly chargeable to a particular defendant will nonetheless be considered by the jury against him.

In view of the extreme importance of the questions presented herein to the administration of justice in the federal courts, and because the Seventh Circuit's decision conflicts with principles announced by this Court in *Kotteakos* v. *United States, supra,* with other decisions of the Seventh Circuit,[25] and with decisions from other Circuits[26]—particularly regarding the necessity of cautionary instructions where the possibility of multiple conspiracies exists—certiorari should be allowed.

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[25] *United States* v. *Johnson,* 515 F.2d 730 (7 Cir. 1975), and *United States* v. *Varelli,* 407 F.2d 735 (7 Cir. 1969).

[26] The decision herein conflicts with Second and Ninth Circuit decisions, cited at p. 17, fn. 17, *supra,* as to the necessity of giving appropriate instructions.

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Because of the prejudicial variance herein, and particularly since the jury may have considered against petitioner evidence pertaining to separate conspiracies to which he clearly was not a party, including evidence of acts and declarations of alleged co-conspirators with whom he was not in any way connected, and in furtherance of conspiracies to which he was not a party, petitioner's conviction should be reversed. In the alternative, the conviction should be reversed and remanded for a new trial at which petitioner must receive appropriate protection through the use of careful instructions concerning multiple conspiracies and limiting the use of such evidence.

He received no such protection in the case at bar.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1417

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARMEN BASTONE and ARTHUR VEAL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 CR 383

THOMAS R. MCMILLEN, *Judge.*

ARGUED NOVEMBER 3, 1975—DECIDED DECEMBER 8, 1975

Before HASTINGS, *Senior Circuit Judge,* PELL and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* Defendants-appellants Carmen Bastone and Arthur Veal were charged under 18 U.S.C. §371, along with eighteen other defendants[1], with con-

[1] Prior to trial one defendant, Daniel Lonero, was severed due to illness. Eleven defendants, John Falcione, Patrick Boenzi, William Paradise, Constantine Athas, Raymond Murray, Charles P. Garner, Robert Walley, Ronald Schoenneman, Eugene Marino, Robert Quagliato and Frank DeRosa, pled guilty. One defendant, Salvatore Bastone, was found not guilty. Five other individuals were named as co-conspirators but were not indicted: Harry Mizok, John Crediedo, Daniel O'Neill, Clarence White and Donald Svehla.

spiracy to transport and cause to be transported in interstate commerce stolen semi-trailers of a total value in excess of $5,000, in violation of 18 U.S.C. §2314.[2] Verdicts of guilty were returned as to Bastone, Veal and four others. Bastone was sentenced to five years imprisonment and Veal received two years imprisonment.

Evidence of the defendants' conduct and the conspiracy was presented primarily through Ronald Schoenneman, an accomplice witness who received certain benefits from the government in exchange for his testimony. The evidence presented showed that Schoenneman met with Carmen Bastone at a coffee shop in a Chicago suburb during the summer of 1970 to discuss the business of stealing trailers. A scheme[3] was outlined to Bastone by Schoenneman whereby forty-foot semi-trailer vans would be stolen from railroad yards and truck docks and then taken to so-called "cleaners", who would remove from the trailers all identifying items such as signs, lettering and public identification, in addition to obliterating serial numbers variously hidden about the trailer. In some cases, the trailers would

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[2] 18 U.S.C. §2314 states, inter alia:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[3] The indictment alleged an ongoing conspiracy to steal and re-sell semi-trailers for a period of three and one-half years. Our own reading of the record indicates an elaborate scheme involving many parties. However, since this appeal involves only two of the defendants we have recounted only those facts in this opinion which we believe are applicable to the appeal of Bastone and Veal. Neither appellant presents a serious challenge to the sufficiency of the evidence presented at trial.

then be further cleaned by an acid wash and, if need be, repainted. Titles would be obtained and, by fraudulent applications for new titles, bogus serial numbers would be imposed on the faces of previously legitimate titles. Those numbers, in turn, would be applied to the trailers to conform with the altered titles. Customers would be obtained, both in Illinois and in other states, the trailers sold, and the profits split among the various participants. Initially Schoenneman agreed to pay $900 for each stolen trailer Bastone provided. Eventually Bastone and Schoenneman became partners and agreed to divide their expenses equally.

Schoenneman also met with co-defendant and appellant Arthur Veal at his Chicago trailer repair shop—Artco—and obtained Veal's services as a "cleaner" of the stolen trailers supplied by Bastone. Veal agreed to perform his services and then drop the trailers, which were to be marked with a painted "x", in a vacant lot.

Schoenneman next contacted Raymond Murray whose task it was to find customers for the disguised trailers. When Murray placed his first order with Schoenneman both of the defendants were notified that the "business" was underway. Deliveries from Veal's shop began in November of 1970. Several of the trailers were sold to customers in Indiana and Kentucky. Veal received two as compensation for his services and those remaining were sold to Mary Ann Bakeries. Sales of trailers to Mary Ann Bakeries continued through 1971 and early 1972. Veal painted the trailers to match other Mary Ann equipment and Schoenneman provided bogus serial numbers. In 1971 Veal also stole trailers from General Transport Equipment Co. and cleaned them for resale. He further arranged to purchase junk trailers from United Parcel Ser-

vice in order to obtain title certificates to be used on the stolen trailers. Old trailers and junk titles were also purchased by Schoenneman and Bastone from Fruehauf Trailer. The titles were altered and used in the sale of the stolen and cleaned trailers.

In May, 1972 Schoenneman began cooperating with the Federal Bureau of Investigation. From May 19 through June 20 he made a series of telephone calls to Bastone and other conspirators during which he discussed the stolen trailer business. Many of those conversations were recorded.

I. EVIDENCE OF TAPE RECORDED TELEPHONE CONVERSATIONS BETWEEN CHIEF PROSECUTION WITNESS SCHOENNEMAN AND DEFENDANT BASTONE WERE PROPERLY ADMITTED.

Defendant Bastone moved to suppress the use of five telephone conversations he had with Schoenneman which were tape recorded. Bastone argued that the recordings were improper and inadmissible because Schoenneman did not give his voluntary consent; and, further, that he was the suspect of an investigation in which Schoenneman was acting as a government agent. Thus it is his contention he was entitled to be given the *Miranda* warnings before partaking in the telephone conversations. After hearing the evidence, including testimony of Schoenneman, the trial court denied the motion to suppress. We believe the trial court was correct in denying the motion.

It is well established that a party to a telephone conversation risks a third party hearing the content of the conversation with the consent of the second party. In the federal system if one party consents to the electronic recording of a conversation it is generally admissible de-

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spite the other party's objection. See *Rathburn* v. *United States*, 355 U.S. 107, 111 (1957); *Carnes* v. *United States*, 295 F.2d 598, 602 (5th Cir. 1961); *United States* v. *Martin*, 372 F.2d 63, 65 (7th Cir.), *cert. denied*, 387 U.S. 919 (1967).

The essential question here is whether or not Schoenneman gave his consent to recording the conversations. The appellant argues that the trial court ignored the realities of the situation which indicated that Schoenneman only purported to consent to the interception and recording. He cites the decisions of *Weiss* v. *United States*, 308 U.S. 321, 330 (1939); *United States* v. *Laughlin*, 233 F. Supp. 623 (D.C. Cir. 1963); and *United States* v. *Napier*, 451 F.2d 552 (5th Cir. 1971); however, those cases involve situations where the party's consent could be seriously questioned either because of incapacity or government pressure. On the other hand, the facts in this case belie the contention that Schoenneman's consent was involuntary.

Schoenneman had not received "promises" of leniency or of a change in location and new identity prior to his making the telephone calls. After several weeks of conversations elapsed, Schoenneman suggested the taping of telephone conversations. While there was discussion about the United States Marshal's protective custody program at various meetings, the actual decision to move Schoenneman and his family out of town came about one week prior to his June 22nd departure, well beyond the first telephone recording of May 19.

During this cooperation with the government, Schoenneman was receiving no compensation, lived at his home, was never arrested, restricted, nor was he under surveillance. Schoenneman was aware that he would not receive immunity but that his cooperation would be made known at trial. Finally, the trial court also was made aware of

executed advice of rights and consent to monitor forms, personally executed by Schoenneman before each conversation.

We fully realize that Schoenneman's cooperation stemmed from the fact that he believed he would receive a better deal from the government. Yet that fact alone does not vitiate his consent or indicate that his actions were the product of government control. A finding of involuntariness or coercion should not result simply because a person has been indicted or is the subject of a government investigation. *United States* v. *Silva,* 449 F.2d 145, 146 (1st Cir. 1971); *United States* v. *Jones,* 443 F.2d 1176, 1180 (D.C. Cir. 1970), *cert. denied* 402 U.S. 950 (1971); also see *United States* v. *Bonanno,* 487 F.2d 654 (2d Cir. 1973).

That Bastone was not given *Miranda* warnings is quite frankly a weak argument. A person is not entitled to warnings simply because an investigation has focused upon him. The test is not focus alone, but rather, focus plus custodial interrogation. *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The cases cited by Bastone in support of his focus contention are different in that they deal with tax cases in which a taxpayer is interviewed after his case has been presented to the Intelligence Division of the Internal Revenue Service. In those cases, the putative defendant clearly faces government compulsion. See *United States* v. *Lockyer,* 448 F.2d 417 (10th Cir. 1971); *United States* v. *Turzynski,* 268 F.Supp. 847 (N.D. Ill. 1967); *United States* v. *Wainwright,* 284 F.Supp. 129 (D.Col. 1968).

Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into

custody or otherwise deprived of his freedom of action in a significant way'' (*Miranda,* 384 U.S. at 444). When Bastone made the admissions during the telephone conversation he was neither in custody nor deprived of his freedom, nor was he being interrogated by law enforcement officers.

Simply because Schoenneman was operating as a government informant does not make the content of the telephone conversations inadmissible. The Fourth Amendment has never been construed to protect a person who voluntarily confides in another person who is acting as a government informant or undercover agent. *United States* v. *White,* 401 U.S. 745, 749 (1970); *Hoffa* v. *United States,* 385 U.S. 293 (1966). In *United States* v. *Gardner,* 516 F.2d 334 (7th Cir. 1975), a ''cooperating individual'' apprised the FBI of Gardner's attempt to dispose of certain stolen securities. There, a plan was developed by the FBI by which agents assumed undercover roles as a bank executive and an attorney willing to prepare a fraudulent certificate of ownership. When the latter agent met with Gardner, he responded to a question about the origin of the theft and committed incriminating actions. Citing *Miranda* and *Hoffa,* the court held that Gardner's admission and actions were not the consequence of inherent compulsion because the agents had assumed undercover identities. Therefore, Gardner was ''not confronted with governmental authority of which he was aware. . .,'' and was not entitled to receive *Miranda* warnings. (516 F.2d at 339).

Similarly, in the case at bar, the activities of the FBI agents when Bastone made these recorded admissions were a part of the undisclosed investigative process in which Schoenneman was a voluntary participant, and, consequently, Bastone was not confronted with govern-

mental authority. Therefore Bastone had no right to receive *Miranda* warnings at the times in question.[4]

Bastone next asserts that even if the telephone conversations were admissible they operated to deny him a fair trial because the court refused to excise certain prejudicial portions and because Schoenneman was allowed to testify as to what he himself meant by certain slang words which he had used in the taped conversations. We think that the decision not to edit the tapes and to allow explanation of the slang terms was clearly within the purview of the trial court's discretion. In such an instance we believe that a reversal should not occur unless there is manifest error or an abuse of this discretion. In this case the trial judge was best able to assess the impact that the tapes and testimony would have upon the jurors. Thus, now on appeal, we rely heavily upon his judgment and find no error or abuse of his discretion.

II. THERE WAS NO PREJUDICIAL VARIANCE IN THE INDICTMENT CHARGING A SINGLE CONSPIRACY AND THE PROOF PRESENTED AT TRIAL.

The crucial question here is: did the government's case show one common scheme, plan or purpose indicating a conspiracy among the defendants? Or did the evidence show a number of separate unrelated conspiracies? Both defendants contend that multiple conspiracies were shown

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[4] Bastone points out that the government cannot always absolve itself of official responsibility for the acts of private citizens, citing *United States* v. *Stein*, 322 F.Supp. 346 (N.D. Ill. 1971). In *Stein* the government encouraged a private individual's "irregular acquisition" of certain evidence rendering the exclusionary rule applicable. However in this case there is no evidence of government encouragement that is not in accordance with the law.

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and the jury may have considered against the defendants evidence pertaining to separate conspiracies to which each of them was clearly not a party, including evidence of acts and declarations of alleged co-conspirators with whom they were not in any way connected. Further, that their individual cases were substantially prejudiced because the trial judge failed to give an instruction telling the jurors that a finding of one single conspiracy was a prerequisite to convicting the defendants. Veal also claims that it was error for the court not to give a limiting instruction regarding certain evidence.

The benchmark and controlling decision on the question of a single conspiracy being charged and multiple conspiracies being proven is *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946).

In *Kotteakos*, thirty-two persons were indicted for a single conspiracy to induce various financial institutions to make loans which would then be insured by the Federal Housing Administration on the basis of fraudulent information. Nineteen of these persons were brought to trial and seven were eventually convicted. The government admitted that the evidence proved eight or more separate conspiracies by separate groups of conspirators which had little or no connection with each other.

However, by simply charging one conspiracy the government was able to present a mass of evidence which reflected equally on the most culpable to the most innocent of the defendants. Consequently, the Supreme Court reversed stating:

> ". . . if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers of transference of guilt from one

> to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one can really say prejudice to substantial right has not taken place . . . as it [the offense] is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals becomes greater and greater."

Of course, the Court has also held that not every variance is fatal. *Berger* v. *United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *Blumenthal* v. *United Staates,* 332 U.S. 539, 68 S.Ct. 248 (1947). Also see *United States* v. *Kenny,* 462 F.2d 1205 (3d Cir. 1972). Recently this Court set forth the test to distinguish between a single conspiracy and multiple conspiracies in *United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969), as follows:

> "While the parties to the agreement must know of each other's existence, they need not know each other's identity nor need there be direct contact. The agreement may continue for a long period of time and include the performance of many transactions. New parties may join the agreement at any time while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies.
>
> The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times. Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with these core conspirators and others to achieve a common goal may be members of an overall conspiracy.
>
> In essence, the question is what is the nature of the agreement. If there is one overall agreement among

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> the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy" (407 F.2d at 742) (citations omitted).

The *Varelli* test is applicable to the case at bar for the proof here plainly demonstrated one overall agreement among the various parties to perform different functions in order to carry out the single objective of the conspiracy —the sale of stolen trailers.[5]

The evidence also showed a few collateral transactions that were not totally directed toward the main scheme or conspiracy. However, since the trial judge adequately instructed the jury,[6] the admission of such testimony that

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[5] In order to meet a common objective, indispensable functions were performed by one or more conspirator. Initially, the trailers were stolen. Bastone clearly had a part in completing this function by virtue of his obtaining thieves. Next, to avoid detection, the stolen trailer was "cleaned", any and all identifying objects removed. This was the work of Art Veal and others. Next, there had to be acquisition of titles which were forged to evidence a phony serial number. Thereafter, the phony serial number was placed upon the trailer by the "cleaners". After the trailer was prepared, customers were obtained. After the sale was consummated, the trailers were delivered with titles and the payment therefor returned to the administrator, Schoenneman, for distribution to each of the above-named participants. Finally, when capital was low, loans were given to keep the various participants content. This, too, was a major role played by Bastone.

[6] The trial judge stated in part as follows:

> "In determining whether a conspiracy existed, the jury should consider the actions and declarations of all the alleged participants. However, in determining whether a particular defendant was a member, of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts and declarations of other participants until it is established that a conspiracy existed and that he was one of the members.

did not support a continuous single conspiracy was harmless. In addition the collateral activities, denoted as separate conspiracies by the appellants, did not really deal with Veal or Bastone.[7]

We believe that under *United States* v. *Johnson*, 515 F.2d 730 (7th Cir. 1975) the trial court could have left up to the jury the decision of whether the government presented evidence of one conspiracy or multiple conspiracies. But, it is quite clear that the trial judge did not have to give the instruction submitted by the defense which stated "If you [jurors] find that there were a number of separate and distinct conspiracies or enterprises in which some but not all of the defendants or others were involved, you must find the defendants not guilty." Clearly this instruction could be proper in some conspiracy cases. However, it is not appropriate where the defense attempts to create a variance through cross-examination by bringing in new conspiracies. Here the court's own instruction was more neutral and advised simply that the jury must find that the defendants knowingly and willfully participated in the single, particular conspiracy charged. Finally on this point Bastone correctly cites the case of *Tinsley* v. *United States*, 43 F.2d 890 (8th Cir. 1930) for the proposition that a conspiracy cannot occur where the defendants were not working together towards a common

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[7] The so-called additional conspiracies included the following: Schoenneman's hiatus and cessation of illegal activities; the stolen trailer operation which involved only Svehla and Murray; the separate operation involving Schoenneman and Murray which used the O'Rourke Cartage yard at Calumet Harbor. Also much of this evidence was brought out on cross-examination of Schoenneman. We do not believe it would be fair to allow the defense to manufacture a variance through use of the cross-examination of the government's chief witness.

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goal. Our reading of *Tinsley* discloses that factually the decision represents "a horse of a different color", the mutual understanding shown here was wholly lacking in the facts presented there.

Bastone argues that a defendant should not stand convicted in a case where the evidence does not permit the conclusion that he was aware of the scope of the overall enterprise and knowingly participated therein, citing *United States* v. *Peoni,* 100 F.2d 401 (2d Cir. 1938); *United States* v. *Falcone,* 311 U.S. 205 (1940); *Dennis* v. *United States,* 302 F.2d 5 (10th Cir. 1962). The fact that the defendants may not have known all the particulars of the total scope of a conspiracy does not bar a conviction. *Blumenthal* v. *United States, supra,* at 557 (1947); *United States* v. *Crosby,* 294 F.2d 928, 945 (2d Cir. 1961). As Judge Learned Hand cogently stated in *United States* v. *Andolschek,* 142 F.2d 503 (2d Cir. 1944) at p. 507:

> "It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it if they fall within the common purposes as he understands them."

III. THE TRIAL COURT DID NOT ERRONEOUSLY LIMIT THE DEFENDANT'S RIGHT OF CROSS-EXAMINATION.

Under the Sixth Amendment every defendant is given the right to confront those witnesses presented against him. Bastone states that the trial court inhibited his constitutional right by prohibiting proper defense attempts to expose to the jury various facts concerning prosecution witnesses Garner, Murray, Ponzevic, and especially, Schoenneman. We think the key phrase in this argument

is "proper attempts". A review of the record indicates that the defense attorneys, in their zealous attempts to bring out the nefarious activities of the government's witnesses, chose to ignore the rules of evidence. We will consider the defense arguments on an individual witness basis.

First, defendants claim that the trial court erred in preventing questioning aimed at disclosing Schoenneman's state of mind (i.e., did he believe the government wanted some one higher up; did he think he would get a better "deal" for himself if he implicated defendant; was he not giving the government what he thought it wanted for his own benefit; and the like). The government's response is simply that the defense failed to ask the right questions. It is clearly within the trial court's discretion to permit testimony as to promises made by the government in exchange for favorable testimony. *DeMarco* v. *United States,* 415 U.S. 449 (1974); *United States* v. *Rodriguez,* 439 F.2d 782, 783 (9th Cir. 1971); *United States* v. *Greenberg,* 423 F.2d 1106, 1108 (5th Cir. 1970); *Grant* v. *United States,* 368 F.2d 658, 661 (5th Cir. 1966); *United States* v. *Masino,* 275 F.2d 129, 131-132 (2d Cir. 1960). Whether or not to permit further testimony as to the witness' state of mind or motivation has been approved by the Supreme Court in certain cases. Cf. *Davis* v. *Alaska,* 415 U.S. 308, 315-318 (1974). However, in this case the trial court, in its discretion, may have properly assumed that further cross-examination into the witness' subjective thoughts would not be meaningful in light of the examination conducted previously which clearly showed that the witness gained a great deal by becoming a witness for the

government.[8] The trial court has broad discretion in determining probative value. *United States* v. *Kissane*, 478 F.2d 1098, 1101 (7th Cir. 1973); *United States* v. *Braasch*, 505 F.2d 139, 149 (7th Cir. 1974).

Second, defendants complain of the court's limitation of cross-examination of witness Ponzevic in that it prevented the defense from demonstrating that this witness had tailored his testimony to make it conform to an erroneous document. As a general rule a witness can be questioned about inconsistent testimony and the court may allow the use of extrinsic evidence to impeach the witness. *United States* v. *Braasch*, 365 F.2d 395, 401 (2d Cir. 1966); *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964); *United States* v. *Partin*, 493 F.2d 750 (6th Cir. 1974). In addition a reviewing court will closely scrutinize contradictory testimony by an accomplice witness who would have reason to commit perjury. *United States* v. *Persico*, 305 F.2d 534, 537-540 (2d Cir. 1962); *United States* v. *Harris*, 462 F.2d 1033, 1035 (10th Cir. 1972). At trial witness Ponzevic was questioned as to whether he was trying to

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[8] Schoenneman's devastating cross-examination showed that he had previously been investigated by the FBI regarding stolen trailers; that he had been in the phony title and stolen trailer business in the late 1960's; that he had debts of more than $300,000; that he obtained a bank loan to pay off certain debts by using stolen, fictitious titles to support his application; that the loans which he had obtained were, in some cases, the subjects of civil suits, and, in any event, were not paid since his cooperation with the government; further, that he was afraid he might get ten years incarceration for bank fraud; that he had filed no tax returns and paid no income tax for any fiscal year from 1968 to the present, despite making money in the stolen trailer business; that he had received no tax bills from the government and was never charged with failing to file, though an IRS criminal investigation was pending; that he was in the juice loan business, engaged in a stolen stocks and securities deal and fenced stolen merchandise.

make his testimony conform to certain documents. The witness responded "It could be." Defense counsel pursued the issue. An objection was eventually made and the judge responded that an inquiry into the circumstances was proper but the manner in which counsel was doing it was objectionable. After some further questioning and objections, counsel stated "I have no further questions, Judge. I just cannot seem to get the right one out." Thus this reviewing court is presented with a situation where the court stated it would allow impeachment of the witness but trial counsel abandoned the issue. As a consequence the argument that the court erroneously limited the cross-examination and refused extrinsic evidence is meritless.

Third, the defendants contend that it was error for the court to rule that it could bring out the fact of witness Garner's prior felony convictions but not the fact that one of the convictions was for rape or to otherwise describe the nature of the prior conviction. The court did allow use of a theft conviction to show the witness' propensity to be dishonest. While not in effect, the new Federal Rules of Evidence would have barred the use of the rape conviction because it occurred twenty-two years ago.[9]

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[9] Rule 609(b) provides:

"(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

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In the words of now Chief Justice Burger in his opinion in *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir. 1967), the issue for the trial judge was whether he "believes the prejudicial effect of impeachment *far* outweighs the probative relevance of the prior conviction to the issue of credibility" (383 F.2d at 939). That test was adopted by this Court in *United States* v. *DiVarco*, 484 F.2d 670, 677 (7th Cir. 1973), and, when applied to this record shows that the trial judge did not abuse his discretion in making his ruling.[10]

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[10] The trial judge also cautioned the jurors about the credibility of testimony of witnesses who had prior convictions or expectations of favors from the government for giving testimony. The instruction stated:

> "It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.
>
> The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness.
>
> It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.
>
> An accomplice is one who voluntarily participates in the commission or the planning of a crime.
>
> Certain witnesses called by the Government in this case have testified that they did criminal acts. The testimony of those witnesses must be considered with caution because those witnesses are accomplices.
>
> The testimony of a witness who provides evidence against a defendant for a promise or favor from the Government, or for other personal advantage or vindication, must be examined and weighed by the jury with caution.
>
> The jury must determine whether the witness' testimony has been affected by interest, or by prejudice against a defendant."

IV. THE COURT DID NOT ERR IN DENYING THE MOTION FOR SEVERANCE.

In order to obtain a severance the moving party must show prejudice, i.e., "that he will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance of acquittal." *United States* v. *Blue,* 440 F.2d 300 at 302 (7th Cir. 1971); *Tillman* v. *United States,* 406 F.2d 930 (5th Cir. 1969); *United States* v. *Kahn,* 381 F.2d 824, 838 (7th Cir. 1967); *Oden* v. *United States,* 410 F.2d 103 (5th Cir. 1969).

On this point defendant Veal cites *Bruton* v. *United States,* 391 U.S. 123, 88 S.Ct. 1620 (1968) contending he was prejudiced when his codefendant McMahon took the witness stand, testified that he had never seen Veal before coming to court, and, then, was cross-examined by the government. Included in the questions asked by the government was the query: "Did you [McMahon] tell the FBI on January 12, 1973, that you picked up trailers from Arteo, a trailer repair shop?" McMahon answered in the negative. Judge McMillen ruled that the government would not be allowed to call the FBI agent who interviewed McMahon to testify in rebuttal to the statment. *Bruton* is inapplicable because no confession was admitted in the government's case in chief and no rebuttal evidence was tendered on this point. McMahon's testimony was actually favorable to Veal, and he was available for cross-examination by Veal's counsel. *Nelson* v. *O'Neil,* 402 U.S. 622, 629-30, 81 S.Ct. 1723, 29 L.Ed.2d 222 (1971); *United States* v. *Clark,* 480 F.2d 1249, 1253 (5th Cir.), *cert. denied* 414 U.S. 978 (1973); *United States* v. *Marine,* 413 F.2d 214, 217 (7th Cir. 1969), *cert. denied,* 396 U.S. 1001 (1970). *Government of Virgin Islands* v. *Ruiz,* 495 F.2d 1175 (3d Cir. 1974). As Professor Moore states:

". . . when the witness repudiates his pretrial inculpatory statement, however, or denies making it, there is no real opportunity for the defense to cross-examine with respect to that statement, and *Bruton* is arguably violated. Normally, the prosecution in this situation will use the earlier statement for purposes of impeachment, and the defense will be satisfied to rely on the witness' trial testimony and forego cross-examination. Nonetheless, there is no *Bruton* violation where the codefendant takes the witness stand and thereby makes himself accessible to cross-examination." Moores *Federal Practice, Rules of Criminal Procedure,* Vol. 8, §14.04[2][c].

V. THE EVIDENCE SHOWED THAT THE VALUE OF THE STOLEN GOODS EXCEEDED $5,000.

Defendants were indicted under 18 U.S.C. §2314. An essential jurisdictional prerequisite under §2314 is that the stolen goods that are being transported exceed $5,000 in value. *United States* v. *Nall,* 437 F.2d 1177, 1184 (5th Cir. 1971); *United States* v. *Barker,* 313 F.Supp. 987 (D. Del. 1970). Value as used in §2314 is defined in 18 U.S.C. §2311 as the aggregate value of all goods referred to in a single indictment. In this case the defendants point out that no distinction was drawn between stolen trailers in Illinois which never left the state, and stolen trailer deals which involved the interstate transportation of trailers stolen and cleaned in Illinois and sold out of state. Defendants contend it was prejudicial error to permit a cumulation of interstate and intrastate sales in order to meet the jurisdictional prerequisite.

We must reject the defendant's argument. The evidence, independent of local sales, showed that proof of value in excess of $5,000 was abundant. Twenty-three trailers were sold to purchasers in New Jersey and thirty-five trailers were sold to buyers in Indiana, Kentucky, and

Georgia. Typical insurance claims paid on three stolen trailers which were sold interstate amounted to $4,000, $4,500, and $4,700.

Although certain stolen trailers were delivered locally at O'Hare Airport to Schulman Air Freight, Inc.,[11] the real owner and purchaser of the trailers was Ardmore Leasing Corp. of Cherry Hill, New Jersey. The titles to the trailers were transferred to Ardmore and checks received in payment for the trailers were drawn on the account of Ardmore at the Continental Bank in Norristown, Pennsylvania. Finally, the jury was properly instructed that in determining aggregate value consideration should only be given to trailers sold across state lines. The court instructed:

> "It is not necessary for the government to prove that a specific defendant personally transported any trailers or knew that any trailers would be transported in interstate commerce. It is sufficient if he willfully and knowingly conspired with one or more persons to cause or induce the transportation of stolen trailers and that thereafter certain trailers of a total value of more than $5,000 were transported across state lines pursuant to the conspiracy."

VI. THE TRIAL COURT DID NOT ERR IN ITS RULING ON THE TESTIMONY OF VARIOUS WITNESSES.

Bastone and Veal both allege that they were denied a fair trial because of various prejudicial statements made

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[11] Twenty-three of the twenty-four trailers sold to Shulman (Ardmore) were shipped interstate to New Jersey. In addition to the local sales involving Olympic Freight Ways (Mary Ann Bakeries), Phillips, Svehla, Liberty and Totoni, and the interstate sales involving Shulman (Ardmore), there were additional interstate sales to Cumberland Wooden Chairs Co., Somerset, Ky., and G.M. Leasing Co., Tucker, Georgia.

by certain witnesses. Initially we note that a reviewing court normally allows a certain amount of discretion to the trial court. The trial judge is in the best possible position to observe the events of the "living courtroom", the demeanor of witnesses, the strategy of counsel, the impact of certain testimony on the jury due to the surrounding circumstances.

The defendants initially sought a mistrial because Schoenneman testified that he was in the protective custody of the government. However, this fact was brought out by the defense and was neither elicited nor suggested by the government. There appeared no prosecutorial intent to prejudice the case against the defendant.

Next, Dean Athas testified that Bastone threatened to break his legs should he tell anyone else about his working arrangement. This statement was admitted as an exception to the hearsay rule because it was a statement by a co-conspirator in furtherance of the conspiracy, i.e., to keep the conspiracy concealed by avoiding conversations. Co-conspirator statements made in furtherance of the conspiracy are generally admissible as an exception to the hearsay rule. *Krulewitch* v. *United States*, 336 U.S. 440, 69 S.Ct. 716 (1949); *United States* v. *Lawler*, 413 F.2d 622 (7th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); *United States* v. *Kahn, supra.* We are not convinced that this statement was properly admitted under the co-conspirator exception to the hearsay rule. But the government offers alternative theories for admissibility, specifically that the threat showed a criminal motive or evidenced a tendency to commit similar acts or crimes, citing *United States* v. *Hutul*, 416 F.2d 607, 624 (7th Cir. 1969); *United States* v. *Marine, supra; United States* v. *Campagna*, 146 F.2d 524, 530 (2d Cir. 1945). We believe that this statement was

admissible. The question of admissibility is really academic because the defense did not make a timely objection to the testimony and in fact used this subject matter as a basis for a somewhat successful impeachment of the witness.[12]

After the government presented its case, co-defendant Jackson took the stand. On cross-examination by the government he denied that he carried a gun all his life. This statement was in contradiction to a previous, tape recorded statement made by Jackson and presented by the government earlier in the trial. Counsel for both defendants objected to this testimony and made motions for mistrial and severance on the basis that this testimony about a co-defendant clearly showed the prejudicial effect of the joinder of all defendants.

Recently the court faced the same problem in *United States* v. *Robinson*, 503 F.2d 208 (7th Cir. 1974) wherein the defendant alleged error in denial of his severance motion and asserted prejudice from his co-defendant's impeaching testimony on cross-examination pertaining to the witness' prior felony convictions and narcotics activity. Nevertheless, the court held no showing of prejudice was made to warrant severance. We stated:

> "Robinson's allegation that the testimony relating to Taylor's criminal record and narcotics activity prejudiced him is not sufficient to make out a showing of prejudice warranting severance. Indeed, Robin-

[12]Athas' credibility as to this statement was substantially impeached when he admitted on cross-examination that, although he had many previous and lengthy interviews and interrogations with federal agents, he never mentioned defendant's alleged threat to him until several weeks before trial. Despite this effective impeachment the defendants maintained that the jurors heard Athas' testimony and that they were prejudiced by it.

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son's allegation is no more than a claim that a separate trial would have created a stronger probability for his acquittal. The mere assertion that the impact of impeachment evidence pertaining to Taylor may carry over to Robinson thereby prejudicing him is not enough to meet the difficult burden imposed on a party seeking to establish prejudicial joinder" (503 F.2d at 215).

The trial court was cognizant of the potential problem created by this testimony. The judge instructed the jury that the conversation was to be considered only against the speaker when it was first introduced and again during the final instructions.[13]

Probably the most significant issue raised on appeal involving witness testimony arises out of two references to Veal being in trouble with the authorities.[14] Veal chal-

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[13] The court stated:

"I have instructed the jury not to consider it with respect to any other defendant.

* * *

The jury will be instructed again, and they have been instructed that this particular evidence is only admissible against the defendant who is on the stand. They will be instructed to only admit conversations between a defendant and someone else if they were in furtherance of an alleged conspiracy as far as any other defendant is concerned.

[14] The statements made by the witnesses are as follows:

"Q. Just prior to your meeting with Grey, Carmen and Salvatore did you have a conversation with Art Veal?

[Answers by witness Schoenneman]

A. Yes, I did.

Q. When, approximately, was that?

A. This was in the summer of 1971.

Q. Where did that conversation take place?

A. I called Grey at his place of business.

(Footnote continued)

lenges this testimony as being tantamount to remarks concerning a prior criminal record which was not an issue properly before the jury. Veal's counsel did not object to Schoenneman's testimony but he did make a motion for a mistrial. However, the court did instruct the jury to disregard the testimony.

It is well established that a defendant in a criminal trial is protected under the Fifth Amendment from the prose-

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(Footnote continued)

Q. Are you talking about Grey or Veal at this point?

A. I mean Veal, I am sorry. I called Art Veal at his place of business.

Q. Would you relate that telephone conversation.

A. Art Veal told me that he had some heat around his place. I asked him if things were bad, if we would have to stop doing business. He said, no, not at this time, the heat wasn't too bad."

The colloquy involving Murray occurred as follows:

"Q. What was said during this conversation?

[Answers by witness Murray]

A. I asked Mr. Schoenneman who I should see at the place, this place called Artco, in regard to getting minor repairs done on the trailers I was picking up. A tire would be flat, a lens missing from a light or something. I wanted to know who to see there to take care of these things so I could pull them on the road. Mr. Schoenneman told me that the place was run by a colored fellow who was getting into some trouble and I should stay away from him. There was no one there to authorize to perform any type of repairs.

MR. ROTENBERG: I object to this conversation and move for a mistrial.

THE COURT: I do not see how this could be in furtherance of any conspiracy. I will strike the answer.

MR. ROTENBERG: And instruct the jury to disregard it?

THE COURT: I will instruct the jury to disregard the answer, the conversation with Mr. Schoenneman. It is not proper testimony."

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cution inquiries into his prior criminal record as long as he does not testify on his own behalf or cause the jury to discover his past convictions through his own actions at trial. *United States* v. *Harrington*, 490 F.2d 490 (2d Cir. 1973); *United States* v. *Panczko*, 429 F.2d 683, 686 (7th Cir. 1970). In this case it was not proper for the government to elicit this type of testimony because it tends to reflect negatively upon the defendant's character which is not at issue. But, clearly, the testimony does not constitute reversible error.

First of all, the statements do not refer to a past criminal conviction of the defendant. They merely indicate surveillance by the authorities. Second, the testimony was presented in a nebulous form and the individual jurors may have drawn different interpretations. It is quite possible that the jury inferred that Veal's troubles stemmed from a government surveillance that led to his present indictment rather than any past criminal conduct. In the one instance where an objection was made, the court properly instructed the jury to disregard the statement. *United States* v. *Fonseca*, 490 F.2d 464, 469 (5th Cir.), *cert. denied* 419 U.S. 1072 (1974); *United States* v. *Roland*, 449 F.2d 1281, 1282 (5th Cir. 1971); *United States* v. *Panczko*, *supra.*

One final contention made by Veal and Bastone in regards to witness testimony is that their constitutional rights to confront witnesses presented against them and a fair trial were violated by the admission of certain hearsay evidence. It is questionable whether the testimony cited amounts to hearsay, but assuming *arguendo* that it is hearsay it falls under the exception to the rule as statements of a co-conspirator in furtherance of the conspiracy. *Krulewitch* v. *United States*, *supra.*

VII. THE COURT'S INSTRUCTIONS TO THE JURY WERE PROPER.

The question of whether to give the jury a cautionary instruction addressed to the intrastate transactions depends on one's interpretation of the evidence. Defendant Veal contends that the local transactions were relevant only as prior, concurrent, or subsequent similar acts. On the other hand the government argues that the local transactions were overt acts in furtherance of the conspiracy. A review of the evidence discloses that certain transactions Veal disputes were in fact interstate. The testimony dealing with the local sales was proper because it showed the identity of the parties in the conspiracy, its funding, and its operation by which the trailers were stolen, cleaned, retitled, and sold. Thus it was admissible to demonstrate the existence and operation of the conspiracy. Contemporaneous overt acts not charged in the indictment may be shown if they are performed in connection with the named acts, and, are done to further the conspiracy. *United States* v. *Clay,* 495 F.2d 700, 705-07 (7th Cir. 1966); *United States* v. *Ardmore,* 363 F.2d 385, 400 (2d Cir. 1966).

It is important to note that Veal failed to offer an instruction on the basis of a similar acts theory. Consequently we will not reverse unless there is a showing of plain error. *Federal Rules of Criminal Procedure* 30 and 52(b). See *United States* v. *Gardner,* 516 F.2d 334, 346 (7th Cir. 1975); *United States* v. *Demopoulos,* 506 F.2d 1171, 1180 (7th Cir. 1974); *United States* v. *Lisowski,* 504 F.2d 1268, 1272-74 (7th Cir. 1974); *United States* v. *Howard,* 433 F.2d 505, 508-12 (D.C. Cir. 1970).

Next, Bastone states that the trial court committed prejudicial error in failing to give a portion of an instruction which he offered. Bastone's instruction No. 17 read:

> "You are instructed that mere knowledge, approval of or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to cooperate in the crime is not sufficient to make one a conspirator."

The trial court gave this instruction except for the words "or acquiescence in" which it deleted, stating:

> "I think the word 'acquiescence' is maybe a little bit ambiguous for the jury. Let's say 'the mere knowledge or approval of the object or purpose', and I think that will cover the matter."

A defendant in a criminal trial is always entitled to have the jury instructed on his theory of defense if it is properly presented and has some basis in the evidence presented. In this case the other instructions given to the jurors adequately told them what type of involvement was necessary to find the defendants guilty of conspiracy.

The trial judges' editing of the instruction appears to be an attempt to clarify and elucidate. It is the duty of the trial judge to avoid instructions which are confusing and would tend to direct the jury's attention away from the issues they are called upon to decide. *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 189 (3d Cir. 1970), *cert. denied* 401 U.S. 948 (1971). The deletion was certainly within the court's discretion and, in light of the other instructions, does not constitute error.

Turning to the other instructions Veal maintains that the instructions on the issues of withdrawal and the admissibility against him of post-withdrawal conversations

of co-conspirators were insufficient. In order to withdraw from a conspiracy one must take an affirmative step to disavow or defeat the purpose of the conspiracy. *United States* v. *Crillo*, 468 F.2d 1233, 1239 (2d Cir. 1972); *United States* v. *Chester*, 407 F.2d 53, 55 (3d Cir. 1968); *Hyde* v. *United States*, 225 U.S. 347, 369 (1911). In this case there is no evidence that Veal took an affirmative step to withdraw from the conspiracy. To the contrary, his cessation of activity with the other indicted co-conspirators was due to the fact that he was having "troubles" with law enforcement officials and thus was required to "lay low" for awhile. The cases cited by Veal in support of his claim that the jury should have been instructed to disregard certain conversations are clearly inapplicable. They involved situations wherein the conspiracy was already over and thus the declarations made could not be in furtherance of the scheme. Furthermore, the court instructed the jury at the close of one witness' testimony as follows:

> "[T]he jury is not to consider the evidence if they find that the individual, any individual, including Mr. Veal, had withdrawn from the conspiracy at the time of the occurrences that were testified to."

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VIII. THE DEFENDANTS' RIGHT TO A FAIR TRIAL WAS NOT VIOLATED BY THE PROSECUTION'S FINAL ARGUMENT.

In final argument counsel for the government commented upon the failure of the defense to call certain witnesses.[15] The prosecutor's rebuttal argument was justified because counsel for Bastone continuously went out-

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[15] By Mr. Burns, the prosecutor:

"It was also stated that the Government failed to call certain individuals. I guess they were inferring that had we called them, those people would have testified differently and said this simply didn't happen. Well, I think they mentioned Vince Auriemma. Well, Vince Auriemma is Carmen Bastone's friend. He could have called him just as easy as we could. Harry Mizok, he is an unindicted co-conspirator—

MR. COLLINS [attorney for defendant C. Bastone]: Objection, your Honor. The defendants are not required by law to call any witnesses.

THE COURT: Sustained.

MR. BURNS: Your Honor, I submit that the defendants have the same subpoena power and I am allowed to argue that.

MR. COLLINS: I object.

MR. BURNS: That is an invited response.

MR. COLLINS: Motion for mistrial.

THE COURT: Well, there has been no evidence as to whether this man is even alive. I will sustain the objection.

MR. BURNS: I believe there was also mention of a man named Joe DeVita. Well, I would state on that they could have subpoenaed Joe DeVita just as easy as we could.

MR. COLLINS: Objection, your Honor. We are not required to subpoena anybody.

THE COURT: Sustained. There has been no evidence of where these people are.

MR. BURNS: Well, your Honor, you let him argue and this is simply invited response.

THE COURT: I am sustaining his objection.

MR. BURNS: All right, I am sorry."

side the record in his closing argument referring to witnesses the government failed to call.[16] He persisted in

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[16] Counsel for Bastone made the following arguments:

"What independent evidence is there? Well, they started talking about the meeting that is supposed to have happened where Carmen Bastone and a man named Auriemma were sitting around and talking and Ron Schoenneman was there and there was some evidence, although it wasn't mentioned in argument, about some other fellow named Lew. Well, they didn't call those people to testify. They could have been, the Government has the right to call anybody they want to and it is their burden of proof.

* * *

Who were the thieves? Quagliato and Marino? Did Marino testify? Do you remember seeing him? He wasn't here. He is under indictment in this very case, but was he here? No.

* * *

The Government can call anybody they want to this stand. Nobody told the Government that they cannot do anything. They can listen to your phone calls, they can serve subpoenas, they can do anything they want to do. They never called John Falcione to the stand to say 'Yes, Carmen and me, we went to do the Shulman deal.' They never called him.

MR. BURNS: Your Honor, I will object to this line of argument of Mr. Collins.

THE COURT: Sustained.

MR. COLLINS: If the Court please—well—

The prosecutor had this Mr. T. G. Grey and they claim Carmen went out there once. Mr. Grey didn't come in and say that. The only person who said that was Ron Schoenneman, that is the only one who said it. They had all of these different points where there were people who could testify to it if it were true, other people, third party people, people like Mr. Loman, people like Bobby Quagliato, people who could say, 'Yeah, I saw Carmen there, he did it.'

* * *

The Government mentioned in this case a Harry Mizok who was charging three percent for cashing big checks. That would be $90 for a $3,000 check. They didn't call him to the stand, but Schoenneman said that this is what he did and he is a defendant.

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this trial tactic despite government objection. Bastone's counsel necessitated a response by government counsel seeking to fairly explain the alleged weaknesses in the government's case. Under this circumstance, where there is an invited response, such comments have been previously approved by this court. *United States* v. *Nowak*, 448 F.2d 134, 140-141 (7th Cir. 1971); *United States* v. *Lawlor*, 413 F.2d 622 (7th Cir. 1969); *United States* v. *Wright*, 309 F.2d 735, 736-9 (7th Cir. 1962).

Accordingly the defendants' convictions are affirmed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 12, 1976.

Before
Hon. JOHN S. HASTINGS, Sr. Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

Nos. 75-1417, 75-1429

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CARMEN BASTONE and ARTHUR VEAL,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
(74 CR 383)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby, DENIED.

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APPENDIX C

Requested Defense Instructions Pertaining to Multiple Conspiracies Issue

"The Defendants are accused of conspiracy to transport in interstate commerce stolen trailers of a value of $5,000 or more. That conspiracy is charged by the indictment to have started in 1968 and to have continued to December, 1972. That is the only charge for which the Defendants are on trial. You should not convict these Defendants, or any of them, if such a conspiracy is not proven beyond a reasonable doubt." (Def. C. Bastone's Inst. 18)

"By the Indictment and Bills of Particulars filed by the Government in this case, the Government charges that a single criminal conspiracy existed among all defendants and alleged unindicted co-conspirators.

The Court instructs the Jury that if the Government fails to prove beyond a reasonable doubt by credible evidence the existence of the single criminal conspiracy charged, or if you find that there were a number of separate and distinct conspiracies or enterprises in which some but not all of the defendants or others were involved, you must find the defendants not guilty.

Proof of separate, distinct and independent conspiracies involving various of the defendants or proof of separate, distinct and independent conspiracies involving various of the alleged objects of the specific conspiracy charged is not proof of the single criminal conspiracy charged. The period of the existence of the single criminal conspiracy charged, if you find that it existed is to be determined from the evidence." (Def. S. Bastone's Inst. Q)

"This indictment charges one single conspiracy. If you find on all of the evidence that one single conspiracy has not been proved, but instead the evidence

shows two or more separate, distinct and independent conspiracies, or separate independent crimes without mutual agreement of the charged defendants and named co-conspirators, then in that event you must find that the indictment has not been proved and that all of the defendants are not guilty." (Def. McMahon's Inst. 42)

"If the evidence shows that some of the defendants were engaged only in one conspiracy while other defendants were engaged only in another conspiracy, then you must acquit all deefndants." (Def. McMahon's Inst. 43)

"All of the defendants must be acquitted if more than one conspiracy has been proven." (Def. McMahon's Inst. 44)

It should be noted that requested defense instructions were mutually cross-adopted. (Tr. 2228)

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1239

CARMEN BASTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was a fatal variance between the indictment, which charged petitioner with participating in a single conspiracy, and the evidence, which he alleges showed multiple conspiracies; and that in any event the trial court erred in failing to submit to the jury the question whether there was more than one conspiracy.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to transport or to cause to be transported in interstate commerce stolen semi-trailers of a total value in excess of $5,000, in violation of 18 U.S.C. 2314 and 371. He was sentenced to a term of five years'

imprisonment. The court of appeals affirmed (Pet. App. 1-31).[1]

The indictment charged that there was a single conspiracy (Pet. App. 2). The evidence, as set forth in the opinion of the court of appeals (Pet. App. 2-4), showed that Ronald Schoenneman[2] and petitioner entered into a scheme to steal semi-trailer vans from railroad yards and truck docks, remove all identification from them, create false titles and give them false serial numbers, and then resell them in Illinois and other states. At the start of the scheme petitioner arranged for the theft of the trailers, for each of which Schoenneman paid him $900; thereafter, Schoenneman and petitioner divided expenses and profits equally.

1. Petitioner contends that there was evidence of multiple conspiracies rather than of a single conspiracy, and that therefore he was prejudiced by a variance between the indictment and the evidence. In support of this contention, he asserts that certain testimony of Schoenneman, concerning stolen trailers that were supplied by unindicted co-conspirator Donald Svehla, referred to a separate conspiracy as to which there was no evidence of petitioner's participation (Pet. 5). Schoenneman testified, however, that the trailers supplied by Svehla were stored and sold together with those supplied by petitioner (Tr. 34-40) and that petitioner shared in the proceeds from the sale of Svehla's trailers (Tr. 87-88). As the court of appeals

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[1]Petitioner was one of fifteen defendants so charged, of whom one was severed prior to trial due to illness and eleven pleaded guilty. Of petitioner's two co-defendants who were tried with him, one was found not guilty and one was convicted and sentenced to a term of two years' imprisonment (Pet. App. 1-2).

[2]Schoenneman pleaded guilty and testified as the government's chief witness.

noted, "the proof here plainly demonstrated one overall agreement among the various parties to perform different functions in order to carry out the single objective of the conspiracy — the sale of stolen trailers" (Pet. App. 11).[3]

Petitioner also asserts that a variance was shown by certain other testimony of Schoenneman, which disclosed a separate conspiracy from 1968 to 1970, involving Schoenneman, Raymond Murray and Charles Garner, and as to which there was no evidence of petitioner's participation (Pet. 5-6). But it was the petitioner who elicited this evidence on cross-examination of Schoenneman, and the court of appeals correctly held that the defense cannot be allowed "to manufacture a variance through use of the cross-examination of the government's chief witness" (Pet. App. 12, n. 7).

The reason why a variance between an indictment charging one conspiracy and proof showing several may be fatal is that it permits the jury to impute to the defendant the acts and statements of individuals with whom the defendant may not have been involved, and thereby prejudices his case. But where, as here, the defendant himself elicits such evidence, any prejudice he may suffer is in direct consequence of his own trial tactics, and therefore is not grounds for a new trial.

2. Petitioner further contends that the court erred in failing to submit to the jury the question whether there was more than one conspiracy. In light of the fact that it

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[3] *Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioner primarily relies, therefore is inapposite. There, the evidence proved eight or more different conspiracies by separate groups of defendants which had no connection with each other, and the court instructed the jury that the acts and declarations of one conspirator bound all. Here, by contrast, the evidence showed petitioner's participation in the overall scheme, and the court's cautionary instruction (*infra*, at n. 4) eliminated any substantial possibility of prejudice by evidence of collateral transactions not directed toward the main scheme.

was petitioner who elicited the evidence of a separate conspiracy, however, the district court did not abuse its discretion in failing to submit to the jury the question of multiple conspiracies. In any event, as the court of appeals pointed out, the evidence showed only a single conspiracy.

The court's cautionary instruction[4] eliminated any substantial possibility that petitioner might be prejudiced by evidence of collateral transactions not totally directed toward the main scheme.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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[4]The trial judge stated in part as follows (Pet. App. 11, n. 6):

> In determining whether a conspiracy existed, the jury should consider the actions and declarations of all the alleged participants. However, in determining whether a particular defendant was a member * * * of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts and declarations of other participants until it is established that a conspiracy existed and that he was one of the members.

DOJ-1976-05

BLEED THROUGH